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No. 03-101

In the Supreme Court of the United States

GALE NORTON, SECRETARY
OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

As the government's opening brief explains, the Administrative Procedure Act (APA) focuses judicial review on discrete "final agency action"—whether a court is being asked to "compel agency action" under 5 U.S.C. 706(1) or to "set aside agency action" under 5 U.S.C. 706(2). See Gov't Br. 12-30. Accordingly, just as a plaintiff "cannot demand a general judicial review of the BLM's day-to-day operations" under Section 706(2), *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 899 (1990), respondent SUWA cannot demand "a general judicial review" under Section 706(1) of that agency's ongoing management of vast areas of public land in Utah. SUWA does not identify any valid basis in the APA's text, history, or purposes for interpreting Section 706(1) to permit review of an agency's programmatic compliance with general statutory standards, divorced from any specifically identifiable obligation to take final agency action.

I. SECTION 706(1) AUTHORIZES A COURT TO COMPEL ONLY DISCRETE FINAL AGENCY ACTION THAT HAS BEEN "UNLAWFULLY WITHHELD" OR "UNREASONABLY DELAYED"

SUWA contends that Section 706(1) permits a court to review *any* alleged failure by an agency to comply with *any* "mandatory, nondiscretionary duty" (SUWA Br. 18)—re-

gardless of whether the "duty" is to take final agency action within a statutory deadline (*e.g.*, to issue regulations "[w]ithin 6 months," 47 U.S.C. 251(d)(1)), or to administer a program in accordance with general statutory objectives or standards (*e.g.*, "to manage [wilderness study areas (WSAs)] * * * so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. 1782(c)). SUWA's position does not comport with the text, structure, and purposes of the APA, would raise significant separation of powers concerns and produce judicially unmanageable consequences, and is without support even in the cases on which SUWA relies. It should, therefore, be rejected.

The agency conduct to which 43 U.S.C. 1782(c) refers—the ongoing "manage[ment]" of WSAs—is not "agency action" within the meaning of the APA, see *Lujan*, 497 U.S. at 890, and a suit to compel such management (in accordance with the non-impairment provision) thus is not a suit to "compel agency action" within the meaning of Section 706(1). Rather, the non-impairment provision sets a standard against which to measure the lawfulness of particular site-specific agency actions that BLM might undertake in the future in its ongoing management of WSAs.

A. SUWA Is Incorrect That Anything An Agency Does Or Fails To Do Is "Agency Action" Under The APA

The APA authorizes judicial review only of "agency action," see 5 U.S.C. 702, 704, 706(1) and (2), which the APA defines as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. 551(13). Standing alone, therefore, the term "agency action" confines judicial review to a particular type of agency activity—namely, a discrete product of an agency's focused decisionmaking process, such as a rule, order, or comparable determination. While SUWA suggests that the term instead encompasses every imaginable type of agency conduct or inactivity (see SUWA Br. 20), Congress would not have used the term so consistently

and defined the term so carefully had Congress simply meant to authorize review of anything an agency might do, or fail to do, in the conduct of its business.

Nor do *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 478 (2001), and *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980), support SUWA's view that "agency action" means nothing less than any ongoing course of agency conduct. See SUWA Br. 16-17, 20-21. Both cases involved challenges to a discrete determination that was found to be agency action: the EPA's self-described "[f]inal decision" on implementation of a revised ozone standard in *American Trucking* (which was held to be final agency action) and the FTC's issuance of an administrative complaint in *Standard Oil* (which was held not to be final agency action). Neither case presented a challenge to an agency's ongoing administration of a program, such as the challenge here to BLM's ongoing management of public lands in Utah.

Accordingly, SUWA errs in characterizing Section 706(1) as providing a remedy whenever an "agency's failure to act violates [a] mandatory duty." *E.g.*, SUWA Br. 13. Section 706(1), by its terms, authorizes courts *only* to compel particular "agency action," not to enforce general statutory objectives not tied to such "agency action." Moreover, the statutory references to "agency action * * * withheld" and "agency action * * * delayed" are most naturally read as referring to discrete action that the agency is obligated to take but is holding back, and that is identifiable as such before the agency acts. See *Webster's Third New International Dictionary* 2627 (1993) (defining "withhold" as "to hold back: keep from action," and "to desist or refrain from granting, giving, or allowing"). When an agency is engaging in the ongoing management of an area or a program, and a plaintiff complains only that the agency's management has not yet fulfilled a general statutory objective, the complaint is not, in common parlance, one that the agency has "withheld" some "action" under Section 706(1).

B. SUWA Is Incorrect That Finality Under Section 706(1) Requires Nothing More Than An Alleged Prolonged Failure Fully To Achieve A Statutory Objective

Although SUWA concedes that 5 U.S.C. 704 makes finality a prerequisite to judicial review under Section 706(1) as well as Section 706(2) (*e.g.*, SUWA Br. 19), SUWA maintains that finality means something quite different depending on whether review is being sought under one or the other of those provisions. SUWA does not dispute that, when a plaintiff seeks review under Section 706(2), the finality requirement is satisfied only if the plaintiff is asking the court to "set aside" as "unlawful" some discrete final agency action —a rule, order, or some comparable determination that represents the culmination of the agency's decisionmaking process and carries legal consequences. See *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). Under Section 706(1), however, SUWA maintains that the finality requirement does not mean that the plaintiff must direct its challenge to asking the court to "compel" as "unlawfully withheld or unreasonably delayed" a comparable final agency action. Instead, SUWA asserts that the finality requirement is satisfied whenever there has been "a final failure to act"—by which SUWA means merely any failure to achieve any general statutory objective, at least so long as that failure is "sufficiently definitive and has direct real-world consequences." SUWA Br. 19. SUWA's interpretation of Sections 704 and 706(1) is wrong for several reasons.

1. *SUWA's interpretation of finality for purposes of Section 706(1) does not comport with the APA's text and structure.* Section 704 provides, in relevant part, that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. 704. In arguing that Section 704 does not confine a Section 706(1) plaintiff to seeking to compel final agency action that has been unlawfully withheld or unreasonably delayed, SUWA seizes on the APA's definition of "agency action" as including "failure to act." 5 U.S.C. 551(13). SUWA asserts that Section 704 may thus be read to provide that an alleged "final agency [failure to act] * * * [is] subject to judicial review," 5 U.S.C. 704. SUWA Br. 19.

Substituting "failure to act" for "agency action" in Section 704 does not advance SUWA's position. As previously explained (Gov't Br. 14, 33), the scope of the term "failure to act" in Section 551(13) is informed by the antecedent, more specific examples of "agency action" in that provision. A "failure to act" constitutes "agency action," therefore, only if it is a failure to issue "the whole or a part of an agency rule, order," or similarly distinct decision. It does not include an agency's failure to satisfy each and every statutory objective in its administration of a program. What Section 704 makes reviewable, therefore, is the rule, order, or other decision in its final definitive form—whether affirmative final action (reviewable under Section 706(2)) or withheld final action (reviewable under Section 706(1)).

SUWA's interpretation of Section 704 rests, moreover, on the facile assumption that, whenever Congress used the term "agency action" in the APA, Congress intended to encompass not only rules, orders, and other affirmative action, but also "failure to act." Substituting "failure to act" for "agency action" makes sense for some provisions of the APA. Section 702, for example, can only properly be understood as affording a right of judicial review to persons "suffering legal wrong because of agency [failure to act] or adversely affected or aggrieved by agency [failure to act]," 5 U.S.C. 702, because otherwise no one would ever have standing to sue under Section 706(1). But such a substitution would make no sense in Section 706 and various other APA provisions. One would not speak of a court's "compel[ling] agency [failure to act] unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1), or of a court's "set[ting] aside agency [failure to act]," 5 U.S.C. 706(2). Nor would one speak of a court's "postpon[ing] the effective date of an agency [failure to act]," 5 U.S.C. 705. There is thus no basis to assume (and SUWA's position rests entirely on the as-

sumption) that Congress intended "failure to act" to be substituted for "agency action" in Section 704.

What is particularly crucial here, however, is that the text and structure of Section 706 cannot be reconciled with SUWA's notion of "final failure to act" as encompassing a generalized failure to meet a statutory standard in administering an ongoing program. In an attempt to give content to a "final failure to act" that does not entail a failure to take a specifically identifiable final agency action, SUWA argues that alleged agency inaction is "final" if, for example, it violates "a mandatory duty," "threatens imminent irreparable harm," is the product of "legal error," or extends beyond a "reasonable time." SUWA Br. 24-26 (emphases omitted). But those considerations are already essential components of a court's inquiry on the merits of a Section 706(1) claim into whether the agency's failure to act is "unlawful[]" or "unreasonabl[e]." If those considerations were subsumed into the threshold finality inquiry, as SUWA suggests, the statutory terms "unlawfully withheld or unreasonably delayed" would be deprived of any independent significance. The adoption of SUWA's position would thus contravene "the established principle that a court should give effect, if possible, to every clause and word of a statute." *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990) (citation and internal quotation marks omitted).

SUWA further errs in asserting that "under § 706(1) the agency action to be *compelled* as a remedy is *different* from the agency action—the failure to act—that is being *reviewed*." SUWA Br. 20. Section 706(1) does not, as SUWA implies, authorize a court to compel just any agency action "as a remedy." Rather, Section 706(1) authorizes a court to compel only agency action that has been "unlawfully withheld or unreasonably delayed." It necessarily follows that the gravamen of any viable Section 706(1) claim is that the agency has "unlawfully" or "unreasonably" failed to take the very "agency action" that the court is being asked to compel. It is that "agency action"—not merely the agency's failure

fully to achieve a statutory objective—that must be "final agency action" for purposes of a Section 706(1) claim.

Nor is SUWA's position consistent with the parallel structure and operation of Section 706(1) and Section 706(2). Properly understood, Section 706(1) authorizes courts to "compel" only the same sorts of "agency action"—*i.e.*, discrete final action, such as a rule or an order—that Section 706(2) authorizes courts to "set aside." SUWA's approach, on the other hand, would authorize courts in Section 706(1) suits to review agency conduct generally, not merely to ascertain whether a particular final action has been "unlawfully withheld or unreasonably delayed," and to order relief not confined to the taking of such final action. That approach would be contrary to the traditional understanding of Section 706(2) as the principal mechanism for judicial review of agency decisionmaking, and of Section 706(1) as a narrow supplemental mechanism to compel completion of discrete agency action so that it may subsequently be reviewed under Section 706(2). See, *e.g.*, United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (discussed at Gov't Br. 22-25).

2. *SUWA's interpretation of finality for purposes of Section 706(1) is inconsistent with the APA's purposes.* SUWA's position would severely undermine the utility of the "final agency action" requirement as a limitation on judicial review under the APA. See Gov't Br. 18-20. It would significantly restrict the circumstances in which Section 706(1) suits could be dismissed at the threshold stage, as well as significantly expand the circumstances in which courts could intervene in the ongoing administration of agency programs.

In a suit under Section 706(2) (or under Section 706(1), as correctly understood), a court may readily ascertain from the pleadings whether the plaintiff has directed its challenge to seeking to set aside (or to compel) final agency action. If the plaintiff has not done so, the suit may be dismissed promptly, without subjecting the government (and other parties) to

unnecessary and burdensome litigation. In contrast, under SUWA's sweeping interpretation of "failure to act" and its "flexible and pragmatic conception of finality" under Section 706(1) (SUWA Br. 14), a court would have to engage in essentially a full merits inquiry in order to determine whether the alleged programmatic failure to act by the agency is final enough to be actionable. The critical limitations on judicial review that Congress included in the APA would be undermined if they could not be enforced at the outset of a case. See *Lujan*, 497 U.S. at 890-894.

Even more significantly, as explained in the government's opening brief (at 18-30) and below (at 11-15), if Section 706(1) were untethered from any anchoring focus on whether the agency has withheld or delayed a specific final action, courts would continually be invited to review, hold trials on, and direct changes in ongoing agency operations. That is not the sort of judicial review contemplated by the APA.

3. *SUWA's interpretation of the finality requirement is unsupported by historical practice.* SUWA errs in asserting that its conception of the APA's finality requirement "is confirmed by *decades* of decisions from the courts of appeals." SUWA Br. 21. Of the several cases that SUWA cites in support of that assertion (see *id.* at 21-22 & n.18), none presented the fatal finality deficiency presented by this case—*i.e.*, the plaintiff's failure to direct its Section 706(1) suit to seeking to compel a particular final agency action it alleges to have been "unlawfully withheld or unreasonably delayed." To the extent that any Section 706(1) claim (or similar claim) was advanced in the cases that SUWA cites, it was a claim to compel an agency to complete a discrete final action—such as the issuance of a regulation, *Public Citizen Health Research Group* v. *Commissioner, FDA*, 740 F.2d 21 (D.C. Cir. 1984); the resolution of an administrative complaint, *Thompson* v. *United States Dep't of Labor*, 813 F.2d 48 (3d Cir. 1987); *Houseton* v. *Nimmo*, 670 F.2d 1375 (9th Cir. 1982); *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961); the disposition of a permit application, *Ligon Specialized*

Hauler, Inc. v. *ICC*, 587 F.2d 304 (6th Cir. 1978); or similar discrete and definitive action, *e.g.*, *Cobell* v. *Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001) (historical accounting of an Indian beneficiary's trust account).[1] To be sure, those cases suggest that, in order to satisfy the APA's finality requirement, an agency's delay in taking such action must be, for example, "extremely lengthy" or "an abdication of statutory responsibility." *E.g.*, *Public Citizen*, 740 F.2d at 32. But none of those cases holds that an agency's ongoing administration of a program—or anything other than a failure to take a specifically identifiable final agency action—may give rise to a suit under Section 706(1). Indeed, in *Sierra Club* v. *Peterson*, 228 F.3d 559, 568 (5th Cir. 2000) (en banc), cert. denied, 532 U.S. 1051 (2001), one of the cases cited by SUWA in this regard (Br. 22 n.18), the court held that an agency's alleged failure to manage national forests in Texas in accordance with the governing statute was *not* cognizable under Section 706(1).[2]

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[1] Although Section 706(1) allows a court to compel the Secretary of the Interior to issue to Indian beneficiaries a statutorily required statement setting forth an accounting of transactions in their individual accounts, the government has appealed subsequent district court orders entering sweeping injunctions under Section 706(1). See *Cobell* v. *Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003), appeal pending, No. 03-5314 (D.C. Cir.).

[2] The appellate decisions that SUWA cites elsewhere in its brief (*e.g.*, SUWA Br. 24-27) similarly involved suits to compel an agency to take discrete final action. See, *e.g.*, *Interstate Natural Gas Ass'n* v. *FERC*, 285 F.3d 18, 57-58 (D.C. Cir. 2002) (suit to compel agency to complete rulemaking); *Forest Guardians* v. *Babbitt*, 174 F.3d 1178, 1180 (10th Cir. 1999) (suit to compel agency "to publish a final regulation" designating critical habitat of endangered species); *Sierra Club* v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987) (suit to compel agency to complete rulemaking); *In re Center for Auto Safety*, 793 F.2d 1346 (D.C. Cir. 1986) (suit to compel agency to promulgate fuel economy standards); *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978) (suit to compel Secretary to resolve disability claims more expeditiously); *Telecommunications Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (suit to compel agency to issue "final order" resolving refund disputes); *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (suit to compel agency to act on petition to suspend or cancel pesticide registration); see also *Brock* v. *Pierce County*, 476

Nor did the pre-APA mandamus practice permit courts to compel agencies or officials to do anything other than to complete a discrete and definitive action. See Gov't Br. 23-25. Nothing in *United States* v. *Los Angeles & Salt Lake Railroad*, 273 U.S. 299 (1927), is to the contrary, as SUWA suggests (SUWA Br. 22). There, a railroad sought review on the meits of "an order of the Interstate Commerce Commission, purporting to determine the 'final value' of [the railroad's] property," as the ICC was required to do under the Valuation Act, ch. 92, § 19(a), 37 Stat. 701 (1913). The Court held that any error in the order was "not a wrong for which Congress provides a remedy under the Urgent Deficiencies Act," ch. 32, 38 Stat. 219 (1913), and that there was no basis for the exercise of general equitable powers, because the order "does not command the carrier to do, or to refrain from doing, anything," "does not grant or withold any authority, privilege or license," and "does not determine any right or obligation." 273 U.S. at 309-310, 313-314. In passing, the Court observed that, because Congress had specifically directed the ICC to issue such orders and "prescribed in detail the subjects on which findings should be made," a carrier would have "the remedy by mandamus to compel the Commission to make a finding on each of the subjects specifically prescribed." *Id.* at 310-311.

An order of the sort at issue in *Los Angeles* might well qualify as final agency action within the meaning of the APA, see 5 U.S.C. 551(4) (defining "rule" to include an agency statement of particular applicability that approves or prescribes "valuations"), although questions might still exist as to the ripeness of a challenge. Cf. *American Trucking*, 531 U.S. at 478-479. More to the point here, however, because the ICC order in *Los Angeles* was a discrete end product of an agency's decisionmaking process that carried legal consequences (*e.g.*, it served as prima facie evidence in

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U.S. 253, 260 n.7 (1986) (noting that Section 706(1) could be invoked to compel disposition of administrative complaint).

future proceedings), the Court's suggestion that the issuance of such an order could be compelled by mandamus is fully consistent with the understanding that Section 706(1) allows a court to compel only final agency action. Accord *ICC* v. *United States ex rel. Humboldt S.S.*, 224 U.S. 474, 477-479 (1912) (holding that mandamus could issue to order agency to exercise jurisdiction in matter that would culminate in discrete action determining rights of common carriers). The Court nowhere suggested in *Los Angeles*, *Humboldt*, or any other decision identified by SUWA that mandamus is available to review an agency's ongoing programmatic compliance with a statutory standard, divorced from any such distinct and definitive action.

C. SUWA's Interpretation Of Section 706(1) Would Invite Undue Judicial Interference With Administrative Functions

As the government has explained, SUWA's sweeping vision of Section 706(1) as a remedy for any perceived failure of an agency to accomplish any "mandatory statutory duty" would open the door to judicial usurpation of agency functions. See Gov't Br. 18-30. Although SUWA asserts otherwise (See SUWA 34-40), SUWA is again incorrect. If Section 706(1) were not confined to the ordering of a discrete final agency action that has been withheld or delayed, courts would be free to engage in wide-ranging review of an agency's ongoing administration of a program, to order systemic changes in an agency's operations that were not specifically required by Congress or requested from the agency, and to reorder an agency's priorities for the allocation of scarce resources.

SUWA's attempt to analogize the scope of judicial review under its reconceptualized Section 706(1) to the scope of judicial review under Section 706(2) is entirely unavailing. See SUWA Br. 37 ("[I]f BLM took final *affirmative* action that impaired the wilderness suitability of a WSA, a court could review and set that action aside as contrary to law, without

in any way trenching on the agency's lawful discretion."). In contrast to a suit under Section 706(2), which can proceed only if it is focused on a final rule, order, or comparable discrete action, a suit under SUWA's vision of Section 706(1) would involve an amorphous challenge to an agency's administration of a program. The court's review of the agency's conduct in such a Section 706(1) suit would not, as in the typical Section 706(2) suit, be guided by the agency's written decision and supporting record and be subject to a deferential standard of review. Instead, as in this case, courts might require development of the underlying facts through discovery and trial. In contrast to the remedy under Section 706(2), which is limited to "set[ting] aside" the final action at issue and remanding to the agency for further proceedings on the discrete issue, see, *e.g.*, *INS* v. *Ventura*, 537 U.S. 12, 14-16 (2002) (per curiam), the remedy under SUWA's vision of Section 706(1) would not be limited to "compel[ling]" specific final action. And, in contrast to a Section 706(2) suit, which ends once the court determines that the agency action at issue is either lawful or unlawful, SUWA's vision of a Section 706(1) suit could stretch on for years as the court monitored the agency's ongoing compliance with its orders.

SUWA is also mistaken in suggesting that courts would not unduly intrude into agency functions because "a § 706(1) claim must be premised on a law creating a mandatory duty requiring action." SUWA Br. 36. The provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, that SUWA has sought to enforce in this case are typical of numerous statutory provisions that direct, for example, that "the Secretary shall manage" or "the Secretary shall administer" an area or a program on an ongoing basis to advance generally stated objectives.[3] Especially in

[3] For some of the many uses of such phraseology in the area of public land and resource management alone, see, *e.g.*, 14 U.S.C. 691(a) and (b); 16 U.S.C. 410r-7(b); 16 U.S.C. 410ii-5(a) and (b); 16 U.S.C. 410mm-1(a); 16 U.S.C. 410nn-1(a); 16 U.S.C. 410rr-7(b); 16 U.S.C. 410ss-1(a) and (d); 16 U.S.C. 410xx-1(a) and (b); 16 U.S.C. 410bbb-2(a)(1); 16 U.S.C. 410ccc-2(a);

an era of limited resources, coupled with urgent demands on the Treasury to protect the Nation's security and strengthen its economy, plaintiffs might often claim that an agency's administration of a given area or a given program has not fully achieved all statutory objectives. And, because a Section 706(1) suit to compel the achievement of such objectives would not be directed to a final agency action interpreting the governing statute and applying it to particular circumstances, courts could be expected to assume the authority to decide for themselves what constitutes, for example, programmatic compliance with a statutory instruction to manage a wilderness study area "so as not to impair [its] suitability * * * for preservation as wilderness," 43 U.S.C. 1782(c); or to administer a national trade data bank "to provide the most appropriate data retrieval system or systems possible," 15 U.S.C. 4907; or to ensure "just and reasonable" rates, *e.g.*, 16 U.S.C. 824d(a).

Nor is it any answer to concerns about judicial overreaching for SUWA to suggest that "the court can issue a general declaratory or injunctive order to compel the agency to comply with the statutory mandate." SUWA Br. 38. Even if it were assumed that plaintiffs would initially seek only to have a court issue an order in the same general terms as the statute, such an order would provide the basis for the court subsequently to exercise its contempt power against the agency and its officials, if they did not act in the manner or at the pace that the court and the plaintiffs considered

16 U.S.C. 430f-10(a) and (b); 16 U.S.C. 459e-6(a) and (b); 16 U.S.C. 459f-5(a); 16 U.S.C. 459g-4(a); 16 U.S.C. 459h-4(a); 16 U.S.C. 460m-15; 16 U.S.C. 460x(a); 16 U.S.C. 460aa-1(a); 16 U.S.C. 460cc-2(a); 16 U.S.C. 460gg-4; 16 U.S.C. 460jj(b); 16 U.S.C. 460kk(b); 16 U.S.C. 460nn-3(a); 16 U.S.C. 460oo(b); 16 U.S.C. 460pp(d); 16 U.S.C. 460qq(b) and (c); 16 U.S.C. 460vv-8(a) and (c); 16 U.S.C. 460xx-1(a); 16 U.S.C. 460bbb-3(a); 16 U.S.C. 460ddd(a) and (d)(1); 16 U.S.C. 460ggg-1(a) and (b)(1); 16 U.S.C. 460jjj-1(a); 16 U.S.C. 460*lll*-11(b)(1) and (2); 16 U.S.C. 460mmm-4(a); 16 U.S.C. 460nnn-12(b); 16 U.S.C. 460ooo-4(a); 16 U.S.C. 543c(b)(1); 16 U.S.C. 1333(a); 33 U.S.C. 2316(a); 33 U.S.C. 2320(a) and (b); 43 U.S.C. 1732(a) and (b); 43 U.S.C. 1783(b).

necessary to achieve compliance with the order. Moreover, plaintiffs would be unlikely to restrict themselves to seeking general orders directing an agency to comply with a statutory objective—as is demonstrated by SUWA's motion for a preliminary injunction requiring BLM to close four wilderness study areas and five other areas to all off-road vehicles (ORVs), even though no such closure requirement is contained in FLPMA or any other applicable statute. See SUWA C.A. App. 44-92 (memorandum in support of motion for preliminary injunction).

SUWA argues that confining Section 706(1), consistent with its text, history, and purpose, to suits to compel discrete final agency action would "carve out a 'no-man's-land' of unlawful agency inaction that is permanently shielded from judicial review." SUWA Br. 1. Congress itself, however, made the choice to focus judicial review under both Section 706(1) and Section 706(2) on final agency action (whether action withheld or action taken), unless a statute permits review in other circumstances. As the Court observed in *Lujan* in response to the similar argument that Section 706(2) must be read more expansively because "violation of the law is rampant within th[e] program" at issue, "[u]nder the terms of the APA, [a plaintiff] must direct its attack against some particular 'agency action' that causes it harm," and "cannot seek *wholesale* improvement of [a] program by court decree." 497 U.S. at 891.

That does not mean that judicial review is never available to a person who believes that an agency is not administering a program in accordance with the governing statute. In many instances, as in BLM's management of public lands, an agency does, in fact, take numerous final actions that may be challenged under Section 706(2) for compliance with relevant statutory requirements. Persons may request that the agency take particular final actions they believe would achieve compliance with the statute—and the agency's grant or denial of such a request may itself be final agency action reviewable under Section 706(2). See Gov't Br. 28-29 & n.16.

Such persons would thereby have presented their claims to the agency before presenting them to the court, affording the agency an opportunity to conduct whatever investigations or proceedings it believed appropriate, compile a record, construe and apply relevant statutory and regulatory provisions and agency policies, and render a final disposition of the matter. See 5 U.S.C. 553(e); *Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975). To assert a far broader challenge to an agency's compliance with a general statutory standard in its ongoing administration of a program, however, persons must seek relief "in the offices of the Department or the halls of Congress, where programmatic improvements are normally made," *Lujan*, 497 U.S. at 891, rather than in the courts, so as to preserve the distinction between administrative and judicial functions reflected in the APA and ultimately required by the Constitution.

II. SUWA'S CLAIMS ARE NOT COGNIZABLE UNDER SECTION 706(1)

SUWA's claims in this case do not seek to compel any discrete final agency action that BLM has a mandatory, nondiscretionary duty to take. For that reason, those claims are not cognizable under Section 706(1). See Gov't Br. 30-48.

First, with respect to SUWA's claim to compel BLM's compliance with 43 U.S.C. 1782(c), the provision of FLPMA stating that wilderness study areas are to be managed so as not to "impair the[ir] suitability * * * for preservation as wilderness," SUWA does not, and cannot, identify in that provision any requirement to take specifically identifiable final agency action. Instead, SUWA attempts to preserve that claim solely on the ground that Section 706(1) authorizes review of any agency failure to satisfy a "mandatory, statutory duty," without regard to whether that duty is expressed in terms of taking of final agency action. *E.g.*, SUWA Br. 12-21. As explained above, SUWA's position is untenable. Moreover, SUWA does not dispute that BLM has undertaken an array of activities, some of which consti-

tute final agency action, in order to protect the public lands at issue from ORV damage. This is not, therefore, a case of an agency's abdication of its statutory responsibilities, whether or not they involve the taking of final action.[4]

Second, with respect to SUWA's claim to compel BLM to take a "hard look" at whether to supplement its previously prepared environmental analyses under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, to address increased ORV use, that claim does not seek to compel final agency action either. See Gov't Br. 36-40. An environmental impact statement (EIS) is neither "the consummation of the agency's decisionmaking process" nor a document "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-178 (internal quotation marks omitted). Although SUWA, relying on *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), argues that a supplemental EIS is itself final agency action under the APA (SUWA Br. 49), SUWA misunderstands *Marsh*. That case did not involve a freestanding challenge under Section 706(2) to an agency's decision whether to supplement an EIS. Instead, the case involved a challenge to the Army Corps of Engineers' "formal decision to proceed with construction of the Elk Creek Dam," 490 U.S. at 367, which was reflected in

[4] During the six days of hearings in the district court, the government presented evidence regarding BLM's management of ORV use on federal lands in Utah, including evidence that: BLM has issued orders prohibiting ORVs entirely in some wilderness study areas and severely restricting ORVs in other areas; BLM has posted signs, erected barricades, and engaged in public education activities designed to confine ORVs to permissible existing trails and open areas; BLM has monitored areas to assess whether additional ORV restrictions should be imposed; and BLM has patrolled areas to the extent that its limited law-enforcement resources permitted to detect unauthorized ORV use. See Gov't C.A. Br. 18-29. Although, as SUWA notes (*e.g.*, SUWA Br. 8), BLM acknowledged that its efforts have not entirely prevented damage to wilderness study areas from ORVs, neither BLM nor SUWA itself has taken the position that such damage has rendered any Utah wilderness study area unsuitable for ultimate inclusion in the wilderness system.

a final agency Record of Decision, see Pet. App. at 53a-58a, *Marsh*, *supra* (No. 87-1704) and was itself the reviewable final agency action. The Corps' decision not to supplement its EIS was thus reviewable *not* because that decision was final agency action, but because it was "[a] preliminary, procedural, or intermediate agency action or ruling" reviewable together with the final agency action taken in the Record of Decision. 5 U.S.C. 704.[5]

Moreover, Section 706(1), like mandamus, authorizes courts to compel only a "precise, definite act" that an agency is without discretion to withhold. See, *e.g.*, Gov't Br. 20-25; *United States ex rel. Dunlop* v. *Black*, 128 U.S. 40, 46 (1888). When, as here, an agency is not proposing any "major Federal action[]," NEPA does not impose any mandatory, non-discretionary duty to prepare or to supplement an EIS. 42 U.S.C. 4332(2)(C). Although BLM's adoption of a land use plan is defined in its regulations as "major Federal action" that requires an EIS (43 C.F.R. 1601.0-6), that "action" is completed once the plan is issued, so that no obligation exists under NEPA to supplement the EIS after approval of the plan. Contrary to SUWA's suggestion (SUWA Br. 48-49), BLM's ongoing management of an area that is covered by a previously promulgated land use plan is not itself "major Federal action," such that BLM would be required continually to reevaluate whether to supplement each of its EISs for existing land use plans in light of changed circumstances. To be sure, BLM is required to engage in additional NEPA analyses in connection with amendments or revisions of its land use plans (43 C.F.R. 1610.5-5, 5-6), and

[5] Similarly, while SUWA cites federal appellate cases that involved claims that NEPA required an agency to supplement an EIS (see SUWA Br. 50), those cases involved a challenge to some *other* agency decision to which the EIS was addressed. See *Colorado Envtl. Coalition* v. *Dombeck*, 185 F.3d 1162 (10th Cir. 1999) (decision to allow expansion of ski area); *Laguna Greenbelt, Inc.* v. *United States Dep't of Transp.*, 42 F.3d 517 (9th Cir. 1994) (decision approving tollroad); *Massachusetts* v. *Watt*, 716 F.2d 946 (1st Cir. 1983) (decision to auction oil drilling rights).

ordinarily in connection with its site-specific actions in an area covered by a plan.[6] BLM may also revisit its NEPA analyses in other situations as it sees appropriate, although BLM is under no mandatory, non-discretionary duty to do so. But those situations are quite different from SUWA's notion that BLM has a continuing freestanding obligation, enforceable in a suit under Section 706(1), to supplement EISs for plans that have already been adopted. That open-ended duty would be unmanageable and would transfer responsibility for allocation of scarce resources from BLM to the courts.[7]

Finally, SUWA's claim to compel BLM to complete certain activities identified in its land use plans also is not cognizable under Section 706(1). See Gov't Br. 40-48. Simply by identifying in a land use plan various activities that the agency anticipates it will undertake in its future planning and management of an area, the agency does not impose on itself a mandatory, non-discretionary duty to complete those activities or to do so within the time projected in the plan (or within what a court determines to be a reasonable time). Nor is any such judicially enforceable duty imposed on the

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[6] BLM has issued notices of intent to prepare or revise land use plans for four of the five areas in which SUWA sought to compel a "hard look" at whether to supplement an earlier NEPA analysis. See 68 Fed. Reg. 33,526 (2003); 66 Fed. Reg. 56,343 (2001); 66 Fed. Reg. 55,202 (2001); see also Pet. App. 32a n.18 (identifying areas). This Office has been informed that BLM anticipates issuing a notice of intent to revise the land use plan for the fifth area in April 2004.

[7] The government's argument that Section 706(1) provides no authority to compel BLM to take a "hard look" at whether to supplement its NEPA analyses is simply a specific application of the government's argument that Section 706(1) provides authority only to compel an agency to take a discrete final action that it is under a mandatory, non-discretionary duty to take. Because the government raised its overarching argument below about the scope of Section 706(1), and the court of appeals addressed it, there is no reason for this Court not to consider the application of that argument to the NEPA claim. Cf. SUWA Br. 47. Nor did SUWA suggest any waiver of that argument in its brief in opposition.

agency by FLPMA or any other applicable statute or regulation.

SUWA errs in attributing that effect to 43 U.S.C. 1732(a), which provides that "[t]he Secretary shall manage the public lands * * * in accordance with the land use plans." SUWA Br. 41. As Judge McKay correctly concluded in his partial dissent below, that provision simply requires that any future site-specific actions that BLM takes in the area covered by a land use plan must be consistent with any binding standards set forth in the plan. Pet. App. 49a. That interpretation of Section 1732(a) is confirmed by 43 C.F.R. 1610.5-3(a), the regulation on which SUWA principally relies (SUWA Br. 41), which provides that "[a]ll future resource management authorizations and actions * * * shall conform to the approved plan." The requirements of the statute and regulation therefore are judicially enforceable only when, unlike in this case, BLM is alleged to have taken an affirmative site-specific action that is inconsistent with the land use plan. Neither provides a basis for a court to order that BLM's limited resources be directed, for example, to patrolling for unlawful ORVs in one area rather than to brush-clearing in another area to reduce a wildfire threat or river-diversion activities in a third area to reduce the threat of flood damage to an archaeological site.

SUWA does not offer any basis to conclude that Congress intended Section 1732(a) to create a judicially enforceable duty to complete activities identified in a land use plan. To the contrary, Congress would have understood, as many of BLM's land use plans expressly note (see Gov't Br. 42-43 & n.18), that an agency's completion of such activities is necessarily subject to available funding, shifting priorities, and other factors that cannot be fully accounted for when the plan is adopted.

In any event, the provisions of the two plans on which SUWA relies do not create mandatory, non-discretionary duties enforceable in a suit under Section 706(1). See SUWA

Br. 7-8, 41.[8] The "monitor[ing]" of ORVs referred to in the ORV Implementation Plan for the Henry Mountain Area does not constitute "agency action," much less "final agency action," that can be judicially compelled, because it does not constitute a discrete action that consummates BLM's decisionmaking process or carries legal consequences. Similarly, although SUWA asserts that the land use plan for the San Rafael area "committed BLM" to designate ORV routes by 1992 (SUWA Br. 7, citing J.A. 152-159, 162-163), the applicable table specifically identified the schedules set out for that and other tasks as merely "anticipated." J.A. 158.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MARCH 2004

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[8] The parties appear to agree that BLM has completed the two activities identified in the land use plans for the San Rafael and Henry Mountain areas that SUWA specifically sought to compel in its preliminary injunction motion. SUWA's claim to compel BLM's compliance with its land use plans may nonetheless retain vitality. Cf. SUWA Br. 40. The claim, as pleaded in SUWA's complaint, is not limited to the two now-completed activities or to the two plans in which those activities were described. The district court dismissed the claim as it pertained to all nine areas that were at issue at the preliminary injunction stage (not merely as it pertained to the two specific activities), and the court of appeals reversed that ruling. See J.A. 56-57; Pet. App. 39a, 75a.